No. 76-1086

In the Supreme Court of the United States

OCTOBER TERM, 1976

LOCAL UNION NO. 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
CARL L. TAYLOR,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

INDEX

CITATIONS

231-981—77——1

Cases—Continued

Statute:

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1086

LOCAL UNION NO. 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 26-33) is reported at 543 F. 2d 1373; the court's *en banc* denial of petitioner's suggestion of rehearing *en banc* (Pet. App. 18-24) is reported at 543 F. 2d 1376. The Board's Decision and Order (Pet. App. 36-38) are reported at 208 NLRB 540.

JURISDICTION

The judgment of the court of appeals (Pet. App. 34–35) was entered on December 6, 1976. The petition for a writ of certiorari was filed on February 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found, on the facts of this case, that two separate divisions of a parent corporation operated sufficiently independently of each other and of the corporation to constitute separate "persons" for purposes of Section 8(b)(4)(B), the secondary boycott provision, of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 2–3.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. The Vulcan Materials Company (hereinafter "Vulcan") is a New Jersey corporation engaged in the manufacture and marketing of chemicals, metals, and heavy construction materials. Vulcan is headquartered in Birmingham, Alabama, and conducts its operations through a chemicals group, a metals group,

and five construction divisions within a construction materials group. The construction divisions, two of which are involved here, each produce and market their products in the geographic area they serve and do not compete with each other. The Mideast division (hereafter "Mideast") produces crushed stone and operates in North Carolina and Virginia. The Chattanooga division (hereafter "Chattanooga") produces crushed stone and ready-mixed concrete and serves the Chattanooga, Tennessee area. (Pet. App. 44–45.)

Vulcan's top corporate officials are a board of directors and an executive committee appointed by the board. Under them are two executive vice presidents, one for the chemicals and metals group and one for the construction materials group. Each division within the construction materials group is headed by a president who is responsible to Vulcan's executive vice president and board of directors for the efficient and economical operation of the division. (Pet. App. 45; A. 88, 93–94.)[1]

The two divisions here involved—Mideast and Chattanooga—function independently of each other and of Vulcan. Each division president has autonomy in the daily operations of his division. He has sole responsibility for the production and marketing of the division. He alone selects his staff, hires and discharges

[1] "A." references are to the appendix to the briefs below; a copy has been lodged with this Court.

personnel, and determines their pay. (Pet. App. 45; A. 94, 175.) Generally, there is no day-to-day communication between the divisions or between the divisions and Vulcan (Pet. App. 45; A. 92, 176–177, 178).

Vulcan maintains at its home office in Birmingham an industrial relations staff whose services are available to the divisions upon request (Pet. App. 45–46). However, each division president possesses broad authority to formulate labor-relations policies for his division, as well as to negotiate and execute collective-bargaining agreements. A member of the industrial relations staff participates in collective bargaining for a division only at the invitation of the division's president. The divisions are under no obligation to use the Vulcan staff, and they are free to accept or reject any of its recommendations. (Pet. App. 45–47, 48–49; A. 92, 95, 97–98, 102–103, 131, 166–167, 172–174, 176, 205–206, 208–209, 217–218, 220–221, 232.) Final authority regarding management proposals rests in the presidents of the divisions (Pet. App. 48–49; A. 98–99, 104, 172–173, 206, 209, 221).

Mideast and Chattanooga do not exchange products, nor is there any interchange of employees between the respective divisions. There is no line of advancement between the various divisions, or between the divisions and Vulcan. (Pet. App. 45; A. 90–91, 101, 175, 206.) While there is some transfer of equipment between the construction divisions, this interchange is negligible. The transfer is an arm's-

length transaction and on the same rental basis as when equipment is loaned to or exchanged with competitors. (Pet. App. 45; A. 192–195, 198–199.)

2. After being certified by the Board as the collective bargaining representative of a unit of employees at Mideast's Central Services Division, Mideast and petitioner Union scheduled a collective bargaining meeting for June 21, 1972 (Pet. App. 46). Prior to this meeting, Louis Graham, president of Mideast, telephoned Vulcan's Manager of Industrial Relations, Carl Whitten, and requested that he participate as a member of Mideast's negotiating team in the forthcoming negotiations (Pet. App. 46; A. 95–96). Graham, however, formulated Mideast's contract proposals (Pet. App. 46–47; A. 172–173).

At the outset of the first negotiating session on June 21, and again at the second meeting in July, Whitten informed the Union's representatives that Vulcan was decentralized in management structure and that each division was responsible for the profits of the business and for the running of the business. Whitten also stated that, although he was from the home office, he was present at the invitation of the division and that his role would simply be to help the division express its particular views. (Pet. 46–47; A. 99–100, 177.) Under specific authority from President Graham, Whitten acted as Mideast's chief spokesman throughout the negotiations and made

231-981—77——2

tentative agreements with the Union pursuant to his delegated authority (Pet. App. 47; A. 95, 97–98, 244). Graham reviewed the division's proposals prior to each negotiating session (A. 172). He also rejected several specific recommendations suggested by Whitten (Pet. App. 47; A. 97, 173–174). Final decisions regarding the contents of Mideast's contract proposals were made by Graham (Pet. App. 47; A. 98–99, 172–173, 174). On August 31, 1972, after several unsuccessful discussions, Mideast and the Union reached an impasse in negotiations (Pet. App. 47; A. 100, 174).[2]

On October 2, 1972, the Union struck Mideast and began picketing the Central Services Division in Winston-Salem, North Carolina (Pet. App. 47; A. 100–101, 174). On October 20, the Union also began to picket Chattanooga's ready-mix plant in Chattanooga, Tennessee. The pickets carried signs bearing the following legend: "Vulcan Materials Plant on Strike—Teamsters Local 391." On October 25, the Union, utilizing identical picket signs, extended its picketing to Chattanooga's quarry. (Pet. App. 47; A. 207.)

[2] On three occasions during the negotiations, Robert Majors, another representative from Vulcan's home office, visited Mideast's facilities. At the invitation of Mideast, he attended the final negotiating session as an unofficial observer. On two other occasions, he was invited by Mideast to recommend a training program for supervisors and to assist in preparing for a strike. (Pet. App. 47 n. 6; A. 185–188, 221–222, 226–229.)

The Union did not represent any employees employed by Chattanooga, and it had no labor dispute with that division (Pet. App. 47–48; A. 102, 206).[3] As a result of the picketing at Chattanooga, Chattanooga's employees ceased doing any work, thereby shutting down the entire operation (Pet. App. 48; A. 207–208)[4].

B. THE DECISION OF THE BOARD

The Board, adopting the decision of its Administrative Law Judge, found that "Vulcan did not maintain actual or active control of the labor relations policies of either Chattanooga or Mideast" (Pet. App. 50). For, "although Mideast and Chattanooga availed themselves of the services of Vulcan's Whitten and Majors, * * * they served simply in an advisory capacity during bargaining sessions, with final authority regarding management proposals residing in the presidents of the Chattanooga and Mideast divisions (Pet. App. 49).

The Board applied the settled principle (see *infra*, pp. 10–12) "that separate corporate divisions are sepa-

[3] Chattanooga's employees were represented by other unions, including a sister local of Local 391, and no labor dispute existed between Chattanooga and these other labor organizations (Pet. App. 47–48; A. 204–205).

[4] On December 22, 1972, the United States District Court for the Eastern District of Tennessee enjoined the picketing at Chattanooga pursuant to Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), *Phillips* v. *Local 391, Teamsters*, 82 LRRM 2195 (A. 287–300).

rate 'persons,' and, as such, are entitled to the protection of Section 8(b)(4)(B) from the labor disputes of the other, if neither the division nor the parent exercises actual or active, as opposed to merely potential, control over the everday operations or labor relations of the other" (Pet. App. 44). Accordingly, it concluded that the Union violated Section 8(b)(4)(B) by picketing Chattanooga in its dispute with Mideast (Pet. App. 50). The Board entered an appropriate remedial order (Pet. App. 37, 52–55).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals, in a *per curiam* opinion, upheld the Board's decision and enforced its order (Pet. App. 26–33). The court stated (Pet. App. 31–33):

> There can be no question that in furtherance of its dispute with Mideast the Union picketed Chattanooga, whose employees were members of other unions and had no dispute with Chattanooga. As a result, the Chattanooga employees ceased work and normal operations were closed down. Moreover there is no question that by its picketing the Union induced and encouraged employees of Chattanooga to strike and withhold their services and that the Union thereby restrained and coerced Chattanooga with an object of forcing it to cease doing business with its customers and suppliers. Thus, the issue is whether the Board properly found that Chattanooga is entitled to the protection of the secondary boycott provisions of section 8(b)(4) of the Act. * * * Further refined, the issue is whether the record supports the finding and conclusion of the Board that Chattanooga is an entity sufficiently separate and distinct to be treated as a "person" in applying the secondary boycott provisions of subsection (B).

We think the record supports the Board's conclusions. Although the ultimate power to control both Mideast and Chattanooga resides in Vulcan, in fact that power has not been exercised; on the contrary each division exercises final and independent control over its operations, including its labor relations. The services of Whitten and Majors were advisory only and were furnished only at the invitation of the presidents of Mideast and Chattanooga, who made all final decisions. In short, the evidence justifies the finding that the divisions are operated as autonomous enterprises, under the doctrine of *American Fed. of Television and Radio Artists* v. *N.L.R.B.*, 149 U.S. App. D.C. 272, 462 F. 2d 887 (1972); and *Los Angeles Newspaper Guild, Local 69* v. *N.L.R.B.*, 443 F. 2d 1173 (9th Cir. 1971), *enfg.* 185 NLRB No. 25 (1970), *cert denied*, 404 U.S. 1018 (1972).

The court, *en banc*, unanimously denied the Union's petition for rehearing *en banc* (Pet. App. 18). Chief Judge Bazelon, in a separate statement joined by Judge Wright, indicated that he was troubled by what he considered to be the limited scope of the Board's inquiry into the question of independence of the divisions from the parent (Pet. App. 19–24). He nonetheless agreed that the case was "not an appropriate one

for consideration by the full court" because it does not rise "to the level of 'exceptional importance' required by Fed. R. App. Pro. Rule 35, both because no practical consequences would flow from a reversal of the Board's decision, and because the panel's opinion here is a relatively narrow one, closely tied to the facts of this particular case" (footnote omitted) (Pet. App. 19).

ARGUMENT

The decision of the court of appeals involves a correct application of settled principles to the facts of this particular case, and it is not in conflict with that of any other court of appeals. There is thus no occasion for review by this Court.

1. Section 8(b)(4)(B) of the National Labor Relations Act makes it an unfair labor practice for a union to exert strike pressure for an object of "forcing or requiring any person * * * to cease doing business with any other person" (Pet. 3). The Board and the courts have consistently and repeatedly held that "[t]wo business enterprises, although commonly owned, do not for that reason alone become so allied with each other as to lift the congressional ban upon the extension of labor strife from the one to the other." There "must be something more in the form of common control, as it is usually phrased, denoting an actual, as distinct from merely a potential, integration of operations and management policies." *Miami Newspaper Printing Pressmen's Local No. 46* v. *National Labor Relations Board,* 322 F. 2d 405, 408–409

(C.A D.C.). Accord: *J. G. Roy & Sons Co.* v. *National Labor Relations Board,* 251 F. 2d 771, 773–774 (C.A. 1); *Drivers, Chauffeurs and Helpers Local 693,* 158 NLRB 1281, 1285–1286. Similarly, the courts have approved the Board's position that separate subsidiaries of the same parent corporation are separate "persons," each entitled to the protection of Section 8(b)(4)(B) from the labor disputes of the other, if neither the subsidiaries nor the parent exercises actual or active, as opposed to merely potential, control over the day-to-day operations or labor relations of the other. *American Fed. of Television & Radio Artists* v. *National Labor Relations Board,* 462 F. 2d 887 (C.A. D.C.); *Los Angeles Newspaper Guild, Local 69* v. *National Labor Relations Board,* 443 F. 2d 1173 (C.A. 9), enforcing 185 NLRB 303, certiorari denied, 404 U.S. 1018; *Carpet, Linoleum, Soft Tile, Local Union No. 419* v. *National Labor Relations Board,* 467 F. 2d 392, 400–401 (C.A. D.C.); *General Drivers & Helpers Union Local 749* v. *National Labor Relations Board,* No. 75–1658, C.A. D.C., order entered September 28, 1976, enforcing, 218 NLRB 1330, 1334–1335.

The court below correctly concluded that there was substantial evidence to support the Board's findings that Mideast and Chattanooga each exercised final and independent control over its own operations, including labor relations, and that the services of Vulcan officials Whitten and Majors were merely advis-

ory (Pet. App. 32–33).[5] Given these findings, it follows, under the settled principles set forth above, that the Board was warranted in holding that the Union's economic pressure against Chattanooga was secondary and thus violated Section 8(b)(4)(B) of the Act.

2. *Houston Insulation Contractors Assn.* v. *National Labor Relations Board,* 386 U.S. 664, on which petitioner relies (Pet. 11–12), is inapposite. There was no issue in that case of corporate interdependence. Rather, the Court simply held that employees in one bargaining unit of a company could make common cause with their fellow employees in another unit of the same company who were engaged in a labor dispute with the company.

Royal Typewriter Co. v. *National Labor Relations Board,* 533 F. 2d 1030 (C.A. 8) (Pet. 15), is also inapposite. That case involved the issue of joint liability for unfair labor practices. The court of appeals upheld the Board's conclusion that the parent and subsidiary were a single employer based on the existence of "'common ownership, common management, actual control of the subsidiary's operations by the parent company, and centralized control over labor relations.'" The court particularly relied on the Board's finding that the subsidiary had to and did receive approval from the parent for important labor contract decisions. *Id.* at 1042–1043. The Board found that Vulcan exercised no such control here (*surpa,* p. 4).

[5] Petitioner's challenge to these findings (Pet. 14) raises only an evidentiary issue, which is not appropriate for further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491.

3. Contrary to petitioner's contention (Pet. 16), the Board's view that separate divisions of a single corporation which are independently operated may constitute separate "persons" under Section 8(b)(4)(B) effectuates, rather than perverts, the purposes of that provision. The purpose of Section 8(b)(4)(B) is to limit, not expand, the area of economic conflict in a given dispute. *National Labor Relations Board* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 692; *Local 761, Electrical Workers* v. *National Labor Relations Board,* 366 U.S. 667, 672; *National Woodwork Manufacturers Association* v. *National Labor Relations Board,* 386 U.S. 612, 620. If, as petitioner asserts, common ownership or a sharing of profits, by itself, were sufficient to render separate employing enterprises one entity under Section 8(b)(4)(B), distant and diverse enterprises could be embroiled in labor disputes not of their own making, which they would have no real power to resolve. Cf. *National Labor Relations Board* v. *Pipefitters,* No. 75–777, decided February 2, 1977. The Board's view, on the other hand, is more likely to confine the area of industrial conflict to the enterprise directly involved in the dispute, and with the power to resolve it at the bargaining table.[6]

[6] There need not be a business relation between Chattanooga and Mideast (see Pet. 16) to establish a violation of Section 8(b)(4)(B) of the Act. It is sufficient that the Union's picketing disrupted business relations between Chattanooga and "any other person" (Pet. 3). See *United Marine Division, Local 333,* 107 NLRB 686, 709–711.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
CARL L. TAYLOR,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board.

APRIL 1977

U.S. GOVERNMENT PRINTING OFFICE: 1977